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No. 71-232

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

THE NALLE CLINIC,
Petitioner,

v.

JAMES D. HODGSON, SECRETARY OF LABOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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The Respondent's Brief in Opposition directs no argument to Petitioner's grounds for review that the opinion below is judicially bad and damaging precedent in denying petitioner rights under the Fifth Amendment of the United States Constitution and under the Administrative Procedure Act. However, respondent's brief does raise novel arguments which deserve reply.

1. Respondent argues (Br. in Opp. 5) petitioner's position depends upon the "erroneous view" that Congress in 1949 "disapproved this Court's entire holding in *Roland, supra.*" On the contrary, petitioner argued (Pet. 12-15) that the retail concept analogy, which is clearly stated as the rule for service establishments in

Roland Electrical Company v. *Walling*, 326 U.S. 657, 675 (1946), is still valid precedent and has been reaffirmed in *Mitchell* v. *Kentucky Finance Company*, 359 U.S. 290 (1959) and *Idaho Sheet Metal Works* v. *Wirtz*, 383 U.S. 190 (1966), *reh. den.* 383 U.S. 963 (1966).

The thing overruled by Congress in 1949 (in favor of a more flexible, inclusive test) was the restrictive nature of the Administrator's "business use test." See *Mitchell* v. *Kentucky Finance Corp.*, *supra*, at p. 293. The substitution of a more inclusive test for the business use test was immaterial to the status of petitioner, since petitioner qualified as a retail or service establishment both under the business use test and under the subsequent more inclusive test. The Administrator's business use test held that an enterprise would not qualify as a retail or service establishment unless 75% of its sales of goods or services were to private persons to satisfy personal wants. See Interpretative Bull. No. 6, 1942 WH Manual 326, Pars. 14, 18. This Court in *Roland* did not adopt the Administrator's statement of his business use test, but did reason at page 667:

> "It is rare, if not impossible, for an employee who is engaged in an occupation necessary to the production of goods for interstate commerce to be said to be at the same time an employee engaged in a retail or service establishment whose selling and servicing is confined to ultimate consumers. *These employments are largely mutually exclusive.* To the extent that sales or services are necessary for the production of goods for interstate commerce they generally are by that hypothesis *not sales or services to an ultimate consumer for his personal use* and, accordingly, are *neither 'retail' sales nor services of a comparable character*, within the meaning of § 13(a)(2). [Emphasis added]
>
> *"The logic of this result is as clear as the declared purpose, legislative history and administra-*

tive practice which combine to produce it." [Emphasis added]

Still valid is this Court's reasoning in *Roland* that services rendered to the private consumer for his personal use are far removed from the purpose of the Fair Labor Standards Act, even though such services may occasionally involve handling something that has moved in interstate commerce. The holdings of the *Juarez* and *Central Aguirre* cases, discussed below, comport completely with such reasoning.

It has not been argued that the retail concept analogy has been overruled or restricted by this court or by Congress. One action of the court below which petitioner asserts as prejudicial error is the rejection of this Court's retail concept analogy in favor of a new, highly restrictive "sale of merchandise" test for service establishments. (Pet. 17). The Fourth Circuit's novel sale of merchandise test is substantially prejudicial to service establishments and directly contrary to the purpose of the Fair Labor Standards Act.

2. Respondent contends (Br. in Opp. 6) "the decision below does not conflict with the decisions in *Central Aguirre Sugar Co.* v. *Castro*, 330 F.2d 68 (C.A. 1) and *Juarez* v. *Kennecott Copper Corp.*, 225 F.2d 100 (C.A. 10)" for the reason that the issues are different, i.e., coverage in this case does not depend, as in those two cases, upon employees being engaged in commerce or in the production of goods for commerce, but only upon the "threshold requirement" of 29 U.S.C. § 203(S) that petitioner have "employees handling, selling or otherwise working on goods that have been moved in or produced in commerce . . ." A simple reading of 29 U.S.C. § 203 (S) (3) will dispel respondent's mistaken impression. This paragraph says, "(3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, *which has employees engaged in commerce or in the production*

of goods for commerce . . ." [Emphasis added]. Thus, paragraph (3) of this subsection (which the court below held applicable in this case) is different from the other paragraphs of the same subsection in expressly adding the requirement emphasized above. *Juarez* and *Central Aguirre* expressly held that the employees of the respective hospitals were not engaged in commerce or in the production of goods for commerce. The two cases are thus in direct and irreconcilable conflict with the decision below on this issue. This issue in the three cases is the same. The Tenth Circuit in *Juarez* held as to the forty-six hospital employees named as parties, "It is clear that appellants are not directly engaged in commerce or in work for the production, processing or sales of goods in commerce." 225 F.2d 100, 102. The First Circuit in *Central Aguirre* said, "We think that *Juarez* v. *Kennecott Copper Corporation* is indistinguishable on its facts from the case before us, so far as the defendant's hospital is concerned." 330 F.2d 68, 72.

The other arguments presented in respondent's opposition brief are answered in the Petition. Petitioner respectfully submits that there is no justification for this Court delaying resolution of the highly important questions of law unsettled by the decision of the court below.

Respectfully submitted,

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